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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 70-5112

WILLIE MAE WEBER,

Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Louisiana (A. 71)
is reported at 257 La. 424, 242 So. 2d 567.

The opinion of Court of Appeal of Louisiana (A. 46, 57)
is reported at 232 So.2d 328.

JURISDICTION

The judgment of the Supreme Court of Louisiana was rendered on December 14, 1970. Timely Motion for Rehearing was filed and was denied on January 18, 1971. This Court has jurisdiction under 28 U.S.C.A., Section 1257, in that petitioner specially claims rights, privileges and immunities under the Constitution of the United States.

QUESTION PRESENTED

Whether the Louisiana Law which relegates a deceased father's illegitimate dependent children who are members of his family to a position inferior to that of his legitimate dependent children so that the legitimate children are awarded all allowable workmen's compensation to the exclusion of and the denial of workmen's compensation benefits to the illegitimate dependent children is a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute, Title 23, Sec. 1021(3):

"Child" or "Children" cover only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Article 203, 204 and 205.

Louisiana Revised Statute, Title 23, Sec. 1232:

Payment to dependents shall be computed and divided among them on the following basis:

(1) If the widow or widower alone, thirty-two and one-half per centum of wages.

(2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.

(3) If the widow or widower and two or more children, sixty-five per centum of wages.

(4) If one child alone, thirty-two and one-half per centum of wages of deceased.

(5) If two children, forty-six and one-quarter per centum of wages.

(6) If three or more children, sixty-five per centum of wages.

(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents.

Louisiana Civil Code Art. 202:

Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards.

Louisiana Civil Code Art. 203:

The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child.

Louisiana Civil Code Art. 204:

Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however, such acknowledgment may be made if the parents should contract a legal marriage with each other. (As amended by Acts 1948, No. 483.)

STATEMENT OF THE CASE

Henry Clyde Stokes was killed in Louisiana on June 21, 1967 while in the course and scope of his employment. He was covered by Louisiana Workmen's Compensation Law. (Louisiana Revised Statutes, Title 23, Sections 1021 et seq.)

At the time of his death, Stokes was maintaining a family unit out of wedlock with Willie Mae Weber. The "family" consisted of Henry Clyde Stokes, Willie Mae Weber, the common law wife, four legitimate children born of the marriage between Henry Clyde Stokes and his estranged wife, Adlay Jones Stokes, and one illegitimate child born of the relation between Henry Clyde Stokes and Willie Mae Weber. Willie Mae Weber was also pregnant at

the time of Henry Clyde Stokes' death as a result of relation with Henry Clyde Stokes and this child was born posthumously (R. 82-85). After the death of Henry Clyde Stokes, the four legitimate children, through their maternal grandmother as guardian, filed a claim for workmen's compensation under Louisiana Workmen's Compensation Law (R. 6). The defendant employer, Earl Gibbon Transport Company, Inc. and its compensation insurer, Aetna Casualty & Surety Company, filed an "Answer and Reconventional Demand" whereby they converted the action into an interpleader action and impleaded among others the two illegitimate children born of the relation between Henry Clyde Stokes and Willie Mae Weber (R. 18).

Willie Mae Weber answered the interpleader and prayed that the two illegitimate children be awarded compensation as dependent children of Henry Clyde Stokes (R. 27). In the meantime, the four legitimate children acting through their maternal grandmother as guardian, filed tort suit against a third party, charging the third party with having negligently caused the death of Henry Clyde Stokes. The tort suit was compromised and the four legitimate children were paid in settlement an amount in excess of the maximum amount which they would or could have recovered under the Louisiana Workmen's Compensation Law (R. 40).

Under the subrogation law of Louisiana an employer or workmen's compensation insurer is entitled to offset any amount which a compensation claimant may recover from a third party tortfeasor. Consequently, the four legitimate children dismissed their workmen's compensation claim (R. 29). The employer and compensation insurer filed an amended and supplementary reconventional demand setting forth the fact of the compromise and full payment of the legitimate children and asserting that all other workmen's compensation claim had been extinguished (R. 31).

In answer to this amended and supplemental petition, Willie Mae Weber, as guardian of the two illegitimate children, specially pleaded that the denial of the right of

compensation to the minor, illegitimate children because of their illegitimacy would deprive them of equal protection of the law and Due Process of Law guaranteed to them by the Fourteenth Amendment of the Constitution of the United States (R. 37).

After trial on the merits, the trial judge rendered a judgment awarding all of the workmen compensation to the four legitimate children and declaring that their entitlement was satisfied by the tort suit settlement. He also rendered judgment in favor of Willie Mae Weber for the use and benefit of the two illegitimate children for any and all such maximum workmen's compensation that might be left remaining and unused by the four legitimate children (R. 58-59). Thus the four legitimate children were awarded all of the workmen's compensation benefit and the two illegitimate children who were members of the same family unit and equally dependent upon their deceased father were awarded nothing solely because they were illegitimate.

On behalf of the two illegitimate children, Willie Mae Weber appealed to the Intermediate Court of Appeal of Louisiana for the First Circuit (R. 5, 70). The Louisiana Court of Appeal avoided the constitutional question on the ground that the pronouncement by the Supreme Court of the United States in *Levy v. Louisiana*, 391 U.S. 68, 88 Sup. Ct. 1509, and *Glonia v. American Guaranty & Liability Insurance Company*, 291 U.S. 73, 87 Sup. Ct. 1515, was not applicable to this workmen's compensation case because the accident out of which the workmen's compensation claim arose, occurred prior to the date of the decision in the *Levy* and *Glonia* cases.

After denial of rehearing by the Court of Appeal of Louisiana the Supreme Court of Louisiana decided the constitutional question in a four to three decision holding that the denial of workmen's compensation to the two illegitimate children solely because of illegitimacy did not deny them equal protection in violation of the Fourteenth Amendment to the Constitution of the United States notwithstanding the *Levy* and *Glonia* decisions.

On April 12, 1971, Willie Mae Weber filed petition for a writ of certiorari from this Court to review the judgment of the Louisiana Supreme Court.

A writ of certiorari was granted on October 12, 1971.

SUMMARY OF ARGUMENT

Workmen's compensation is a statutory replacement and substitute for the general tort remedy for injury or death provided for by Louisiana Civil Code Article 2315.

Because of this close relationship and similarity, the proscription of the Equal Protection Clause which invalidates invidious discrimination against illegitimate children in a tort cause of action for wrongful death of a parent also invalidates invidious discrimination against illegitimate children in a workmen's compensation claim for the death of a parent.

ARGUMENT

Because the Two Illegitimate Children of Henry Clyde Stokes Were Equally Dependent upon Him as Dependent Members of His Family the Same as His Four Legitimate Children, the Relegation of the Illegitimate Children to a Deferred Classification So as To Award All of the Compensation to the Legitimate Children to the Exclusion of the Illegitimate Children Constitutes an Invidious Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The crucial issue in this case is whether the denial to the illegitimate children falls within the reasoning and prohibition of *Levy v. Louisiana*, 391 U.S. 68; or within the permission of *Labine v. Vincent*, 401 U.S. 532, 91 S. Ct. 1017.

In *Levy* the Court held that minor children were not "non-persons"; that because their rights involved "intimate, familial relationship between a child and his own mother"; that because they were dependent upon her and cared for and nurtured by her and "in her death they suffered wrong in the sense that any dependent would"; "legitimacy or illegitimacy of birth has no relation to the nature of the wrong inflicted."

The thrust of *Labine v. Vincent* is, first, to reject the notion that the *Levy* decision, under the aegis of the Equal Protection Clause, invalidates and proscribes all state laws which classify on the basis of legitimacy or illegitimacy, and, second, to preserve the *Levy* decision and make it applicable to the narrow confines of circumstances where classification and exclusion of illegitimates have no rational basis and are therefore arbitrary and invidious.

Obviously the discrimination against the Weber children's claim for workmen's compensation for the death of their father involves the same factors which made the denial of a wrongful death claim to the *Levy* children invidious. The older illegitimate Weber child, Letha Marie, lived with her mother, father and four legitimate Stokes children as a family unit. The then unborn younger illegitimate Weber child, Joseph Lee, was being borne by the mother and had the same potential membership and dependency in the family as the existing children, or as an unborn legitimately conceived child would have had. They suffered the same loss as a result of the industrial accidental death of their father as that which the legitimate children suffered. In theory, at least, in view of their inability to inherit from their father by reason of the Louisiana law of intestate succession which was upheld in *Labine v. Vincent*, 401 U.S. 532, the dependent illegitimate children were left more destitute than the legitimate children as a result of the industrial accidental death of their father.¹

¹It is interesting as well as persuasive to note that in the *Levy* Case the Court alluded to the contrasting fairness of Louisiana's Workmen's Compensation Law which allows an illegitimate child who

It must be observed in this case that the final judgment of the trial court (R. 58-59) decreed that the full compensation liability of the employer, Earl Gibbon Transport, Inc., and its insurer, Aetna Casualty and Insurance Company, was satisfied by the tort recovery against a third-party tortfeasor, but that there was reserved to the children the right to any unused compensation benefits left remaining and unused by the legitimate children. Since the entire compensable amount was already paid and the liability of the employer and insurer satisfied and extinguished, from whence will come the benefits which were reserved to the two illegitimate children?

In final analysis this judicial reservation of rights to spent funds is academic and fictitious. It presents an insurmountable barrier to the dependent illegitimate children obtaining any compensation now, when they direly need it, and in the future whatsoever the need and dependency might be.

Thus there is brought into bold relief the "insurmountable barrier" which distinguishes *Levy* from *Labine*, and which subjects Letha Marie Weber and Joseph Lee Weber to the same invidious discrimination which the Court held in *Levy v. Louisiana*, 391 U.S. 68, to be a violation of the Equal Protection Clause, and which *Labine v. Vincent*, 91 S. Ct. 1017, reaffirmed and left undisturbed.

is a dependent member of a deceased parent's family to recover compensation for his death. *Levy v. Louisiana*, 391 U.S. 68, 72, note 7.

Apparently the Court was not made aware of the discriminatory feature of the law which is before the Court in this instance.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Supreme Court of Louisiana should be reversed.

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November 18, 1971

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No. 70-5122

DENNIS STEPHEN DUNCAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR THE RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 70-5122

DENNIS STEPHEN DUNCAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Tennessee was entered and filed on October 5, 1970, and is reported as **State v. Brooks**, ... Tenn. ..., 462 S.W.2d 491 (1970). A correct copy of this opinion is included in the appendix. (Appx. 48-53). The opinion of the Supreme Court of Tennessee on the Petitioner's petition to rehear was entered and filed on January 18, 1971; and is also reported in **State v. Brooks**, *supra*. A correct copy of this opinion is incorporated in the appendix. (Appx. 54-55). A copy of the judgment pursuant to the opinions is also included in the appendix. (Appx. 56).

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST., amend. XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENN. CONST., art. I, sec. 10.

"That no person shall, for the same offense, be twice put in jeopardy of life or limb."

TENN. CODE ANN., sec. 39-3901.

"Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be imprisonment for life or for any period of time not less than ten (10) years."

QUESTIONS PRESENTED

The Respondent is dissatisfied with the Petitioner's presentation of the questions involved and, therefore, pursuant to **Rule 40(3)** of the **Supreme Court Rules**, presents the questions as follows:

(1) Whether the strict application of the same evidence test to determine identity of offenses violated the Petitioner's Fifth Amendment right not to be twice placed in jeopardy for the same offense.

(2) Whether the Respondent was collaterally estopped from reindicting and trying the Petitioner by the federal rule of collateral estoppel embodied in the Fifth Amendment guaranty against double jeopardy.

STATEMENT OF THE CASE

The Petitioner, Dennis Stephen Duncan, was jointly indicted with one Richard A. Brooks, by the Grand Jury of Montgomery County, Tennessee, on August 28, 1968, for robbery accomplished by the use of a deadly weapon, to-wit: a gun, to-wit: a .22 calibre rifle, in connection with the robbery of one Johnny Bryant, an employee of the Red Ace Petroleum Company. (Appx. 7).

On December 20, 1968, the Petitioner and his co-defendant entered pleas of former jeopardy, asserting that they had been previously put to trial upon an indictment charging that they robbed one Johnny Bryant of money belonging to the Red Ace Petroleum Company by the use of a deadly weapon, to-wit: a gun, to-wit: a pistol. The Petitioner contended that after the first state's witness was called and testified that a .22 calibre rifle was used in the robbery the State moved for a directed verdict of acquittal on the ground that the indictment was in error. The verdict was rendered accordingly, the Petitioner excepting thereto. (Appx. 9-11). On February 10, 1969, the Petitioner amended his plea alleging a violation of his federal constitutional rights. (Appx. 12). On March 18, 1969, the State having answered the plea, the trial judge denied the Petitioner's plea after a hearing. The Petitioner's trial then began in the Criminal Court of Montgomery County, Tennessee, the Honorable William O. Beach, Judge, presiding. The Petitioner, represented by counsel, entered a plea of not guilty. (Appx. 14-15). On March 19, 1969, after hearing all the evidence adduced in the case and after receiving instructions from the trial judge, the jury returned a verdict of guilty of armed robbery and fixed punishment at confinement in the penitentiary for a period of ten years. (Appx. 16-17).

On March 27, 1969, the Petitioner filed a motion for a new trial, which was overruled on April 4, 1969, after a hearing. The Petitioner perfected an appeal to the Court of Criminal Appeals of Tennessee and assigned as error, inter alia, the trial judge's denial of his plea of former jeopardy. The appeal was heard at the October, 1969 term of the Court of Criminal Appeals. On March 4, 1970, the Court of Criminal Appeals, one judge dissenting, reversed the Petitioner's conviction and discharged the Petitioner on the ground that the Petitioner had been twice tried for the same offense. (Appx. 21-22, 23-43). The Supreme

Court of Tennessee granted the Respondent's Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Criminal Appeals of Tennessee entered March 4, 1970. In an opinion filed in October 5, 1970, the Supreme Court of Tennessee reversed the judgment of the Court of Criminal Appeals and affirmed the judgment of the trial court. (Appx. 48-53). On January 18, 1971, the Supreme Court of Tennessee, in a written opinion, denied the Petitioner's Petition to Rehear the case. (Appx. 54-55).

ARGUMENT

I

The Same Evidence Test for Determining Identity of Offenses as Developed and Applied in Tennessee Is Consistent With Federal Standards for Determining Former Jeopardy; Therefore, the Strict Application of That Test to the Petitioner's Case Did Not Violate His Federal Constitutional Rights Under the Fifth and Fourteenth Amendments.

Both the Constitutions of the United States and of the State of Tennessee provide that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. CONST., amend. 5; TENN. CONST., art. 1, sec. 10. Jeopardy is generally considered as attaching "when the accused is put upon trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the jury has been impaneled and sworn." **Etter v. State**, 185 Tenn. 218, 222, 205 S.W.2d 1, 3 (1947). See generally **Green v. United States**, 355 U.S. 184 (1957). Since the constitutional provisions against double jeopardy prohibit subsequent jeopardy only for the same offense, the question is presented concerning what constitutes identity of offenses such as will entitle a defendant to maintain a plea of former jeopardy.

The Supreme Court of Tennessee had an early opportunity to consider this question in the leading Tennessee case of **Hite v. State**, 17 Tenn. 357 (1836). In that case the defendant was first indicted for the larceny of a bank note payable on demand at the **Merchants and Traders' Bank of New Orleans**. After having been acquitted of that charge, the defendant then was indicted for the larceny of a bank note payable on demand at the **Mechanics and Traders' Bank of New Orleans**. The Court held that

the offenses were not legally identical in that a note payable at the Mechanics and Traders' Bank was different than one payable at the Merchants and Traders' Bank. The Court then established the test by which the sufficiency of the plea of former jeopardy is to be tried:

"... whenever the same evidence will support both indictments, it is a good plea; and that, unless the first indictment were such that the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first is not a bar." 17 Tenn. at 364.

A corollary to the same evidence test is the rule requiring conformity between averments contained in an indictment and the proof presented at the trial. Under this rule a material variance between the proof and the averments in the indictment is considered fatal to the prosecution, a material variance being a disagreement as to some matter which is legally essential to the charge.¹ See 5 WHARTON'S CRIMINAL LAW AND PROCEDURE § 2054 (1957). Where there is a material variance with respect to an indictment with the result that a conviction could not be sustained on the evidence due to the variance, then a second indictment which contains charges in conformity with such evidence does not charge an identical offense since the same evidence will not support both indictments.

The Supreme Court of Tennessee has uniformly adhered to a strict rule requiring conformity between averments

¹ In *Arnold v. United States*, 336 F.2d 347, 352 (9th Cir. 1964), it is said that "the rule requiring that allegations and proof must correspond is based on two requirements: (1) that the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." See also *Berger v. United States*, 295 U.S. 78 (1935); *Bennett v. United States*, 227 U.S. 333 (1912).

contained in an indictment and the proof presented at the trial, holding that where a person or thing required to be mentioned in an indictment is described with greater particularity than is necessary, the proof must conform to the greater particularity of the averred description. Substantial variances between such averments and the proof are deemed material variances. For example, in **Young v. State**, 185 Tenn. 596, 206 S.W.2d 805 (1947), two defendants were first indicted for housebreaking and larceny, the premises being described in the indictment as the business house of a named individual and the stolen property described as that belonging to that individual. At the trial it developed that the business house and the property were that of a corporation of which the individual was a stockholder. A verdict of not guilty was returned. A second indictment was returned against the defendant properly describing the premises and the property, although the premises and the property were admittedly the same as that in the first indictment. The Tennessee Supreme Court held that a material variance in the name of the owner of stolen property in a larceny indictment is fatal, and that where there is a material variance between the averments in the two indictments, the two prosecutions are separate as a matter of law. A similar holding was reached in the case of **Wilson v. State**, 200 Tenn. 309, 292 S.W.2d 188 (1956), which upheld the overruling of a plea of former jeopardy where the defendant was first indicted for the theft of brass rollers and later indicted for the theft of bronze rollers.

In view of this Honorable Court's holding in **Benton v. Maryland**, 395 U.S. 784 (1969), which overruled **Palko v. Connecticut**, 302 U.S. 319 (1937), and applied federal double jeopardy standards to the states through the Fourteenth Amendment, the question is presented as to whether the same evidence test for identity of offenses as applied in Tennessee meets federal standards.

Federal double jeopardy standards do not prohibit successive prosecutions for offenses which are not the same. **United States v. Ewell**, 383 U.S. 116 (1966). In determining identity of offenses for double jeopardy purposes, the federal courts have applied the same evidence test. For example, in **Morgan v. Devine**, 237 U.S. 632 (1915), this Honorable Court recognized the same evidence test in the context of determining whether the same transaction constituted more than one offense, holding that a defendant has been in jeopardy if on the first charge he could have been convicted of the offense charged in the second proceeding.² See also **Ebeling v. Morgan**, 237 U.S. 625 (1915); **Gavieres v. United States**, 220 U.S. 338 (1911). See generally, **United States v. DeMarrias**, 441 F.2d 1304 (8th Cir. 1971); **Harris v. United States**, 402 F.2d 205 (D.C. Cir. 1968); **United States v. Friedland**, 391 F.2d 378 (2d Cir. 1968); **United States v. Bruni**, 359 F.2d 807 (7th Cir. 1966), cert. den., 395 U.S. 826; **Arnold v. United States**, 336 F.2d 347 (9th Cir. 1964); **Salta v. United States**, 44 F.2d 752 (1st Cir. 1930). The lower federal courts have also recognized the material variance criterion in applying the same evidence test. In **United States v. Hunter**, 123 F.Supp. 1 (D. Md. 1954), a variance in the serial number of a stolen automobile was deemed material, and a motion to dismiss a second indictment bearing the correct serial number was denied.

In view of the recognition of the same evidence test in the federal courts, the Respondent maintains that its application in Tennessee meets federal standards.

² In addition to its holding in **Morgan v. Devine**, 237 U.S. 632 (1915), this Honorable Court has used the same evidence test to determine whether the same act or transaction constitutes more than one offense in subsequent cases. *E.g.*, **Blockburger v. United States**, 284 U.S. 299 (1932). See also **Gore v. United States**, 357 U.S. 386 (1958). However, in **Abbate v. United States**, 359 U.S. 187, 198 (1959), there is language suggesting that this Honorable Court has not actually sanctioned the same evidence test except in cases where consecutive sentences were imposed on conviction of several offenses at one trial.

In the instant case the Petitioner was indicted and tried for the offense of robbery accomplished by the use of a deadly weapon. The Tennessee statute pertaining to robbery—TENN. CODE ANN., sec. 39-3901—provides:

“Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be imprisonment for life or for any period of time not less than ten (10) years.”

Since the difference between the first and second indictments against the Petitioner was the description of the deadly weapon used to accomplish the robbery, the question presented to the Tennessee courts was whether the offenses charged in the indictments were identical which would entitle the Petitioner to maintain a plea of former jeopardy. The Supreme Court of Tennessee applied the same evidence test first articulated in its leading case of **Hite v. State**, 17 Tenn. 357 (1836), and found that the variance in the description of the deadly weapon averred in the indictments was a material variance; with the result that the same evidence would not support both indictments. Proof of the weapon (rifle) averred in the second indictment was not admissible as evidence under the first indictment which averred a pistol, and a conviction for robbery accomplished with a deadly weapon could not be sustained under the first indictment. Thus, the offenses were not identical under the same evidence test.

It is contended by the Petitioner that under the Tennessee robbery statute³ the use of a deadly weapon merely aggravates the offense of robbery, **State ex rel. Anderson**

³ TENN. CODE ANN., sec. 39-3901:

v. **Winsett**, 217 Tenn. 564, 399 S.W.2d 741 (1964), and that, therefore, a material variance in the type of weapon used would not constitute a material variance with respect to the offense of robbery itself, but merely to the means of aggravation. The Supreme Court of Tennessee in construing Tennessee's robbery statute with respect to the Petitioner's contention resolved this issue against the Petitioner. (Appx. 52). Moreover, the Respondent would make two additional observations with respect to this contention. First, the Petitioner in his first trial asserted that the variance in the description of the weapon used was material when he based his objection to the introduction of evidence on the variance. See generally **Salta v. United States**, 44 F.2d 752 (1st Cir. 1930); **United States v. Hunter**, 123 F.Supp. 1 (D. Md. 1954). Second, to bring an accused under the increased penalty provisions of the Tennessee robbery statute a distinct and separate allegation is required in the indictment. **State ex rel. Anderson v. Winsett**, 217 Tenn. 564, 399 S.W.2d 741 (1964).

The Respondent respectfully submits that the offenses charged in both indictments were not identical under federal standards and that, therefore, the Petitioner was not denied his constitutional right not to be twice placed in jeopardy for the same offense.

II

The Federal Rule of Collateral Estoppel Embodied in the Fifth Amendment Guaranty Against Double Jeopardy Did Not Bar Respondent From Trying Petitioner Under a Second Indictment Where the Offense Charged in the First Indictment Was Not Identical Under the Same Evidence Test and Where the Controlling Factual Issues Had Not Been Resolved.

In the recent case of **Ashe v. Swenson**, 397 U.S. 436 (1970), this Honorable Court overruled **Hoag v. New Jer-**

sey, 356 U.S. 464 (1958), and applied the federal rule of collateral estoppel, as embodied in the Fifth Amendment guaranty against double jeopardy, to the states. Thus, the question is presented as to whether the Respondent was estopped from trying the Petitioner under the second indictment.

The Respondent contends that the holding in **Ashe v. Swenson**, *supra*, does not require a reversal of the Petitioner's criminal conviction. In **Ashe** the petitioner had been acquitted of robbing one of six poker players, apparently on the issue of identity. In a subsequent trial for robbing another of the poker players, Ashe was convicted, the evidence regarding his identity as the robber being somewhat stronger. In reversing Ashe's conviction, this Honorable Court applied the rule of collateral estoppel and said that:

"The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hail him before a new jury to litigate that issue again."

391 U.S. at 446

In a recent decision, the United States Court of Appeals for the Sixth Circuit suggested that the holding in **Ashe** was actually quite narrow. **Pulley v. Norvell**, 431 F.2d 258 (6th Cir. 1970). In that case the Court upheld the imposition of two consecutive sentences on a petitioner who had been convicted of robbing two persons on the same occasion. **Ashe** was distinguished, the Court saying:

"We construe **Ashe** to recognize a distinction between a case where the defendant is convicted in a trial of

one crime against A and trial two of a crime occurring the same time against B, and the situation where at the first trial one of defendants is acquitted of a crime against A under circumstances that the defendant's presence or absence at the scene of the crime is resolved in favor of the accused."

431 F.2d at 261

In the instant case the controlling factual issues were not decided in the Petitioner's first trial. The only issue resolved therein was that the weapon used to accomplish the robbery was not a pistol. Thus, Respondent contends that the rule of collateral estoppel as applied in *Ashe* did not bar Respondent from trying Petitioner under a new indictment charging him with robbery with a rifle.

CONCLUSION

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that the Petitioner's constitutional rights under the Fifth and Fourteenth Amendments were not violated and that, therefore, the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted

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JAN 12 1972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No.

70-5112

WILLIE MAE WEBER,

Petitioner,

—v.—

AETNA CASUALTY & SURETY COMPANY and EARL GIBBONS
TRANSPORT COMPANY, INC.,

Respondent.

**MOTION OF AMERICAN CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*,
AND BRIEF *AMICUS CURIAE***

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No.

WILLIE MAE WEBER,

Petitioner,

—v.—

AETNA CASUALTY & SURETY COMPANY and EARL GIBBONS
TRANSPORT COMPANY, INC.,

Respondent.

**Motion of American Civil Liberties Union for Leave to
File Brief, *Amicus Curiae***

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in the above-entitled case. The attorney for petitioner has consented to the filing of the attached brief. The attorney for respondent refused consent. The respective letters have been filed with the Clerk.

The American Civil Liberties Union has a long-standing institutional interest in protecting the constitutional rights of children, legitimate and illegitimate. Attorneys of the American Civil Liberties Union appeared before this Court in recent years to argue *In Re Gault*, 387 U.S. 1 (1967) and *Levy v. Louisiana*, 391 U.S. 68 (1968). The former decision held that children involved in juvenile proceed-

ings were entitled to a wide range of constitutional protections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. The Union also filed an *amicus curiae* brief in *Labine v. Vincent*, 401 U.S. 532 (1971).

The case at bar draws into question the right of illegitimate children to benefit from Louisiana's workmen's compensation laws upon the death of their natural father. The question is a complex one which involves construction of the equal protection clause of the Fourteenth Amendment. We believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No.

WILLIE MAE WEBER,

Petitioner,

—v.—

AETNA CASUALTY & SURETY COMPANY and EARL GIBBONS
TRANSPORT COMPANY, INC.,

Respondent.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus

The interest of *Amicus* is set out in the Motion for Leave to File, *supra*.

Statement of the Case

Henry Clyde Stokes was killed in Louisiana while in the course and scope of his employment.

At the time of his death, Stokes maintained a family unit out of wedlock with Willie Mae Weber. Included in the household were the four legitimate minor children born of the marriage between Stokes and Adlay Jones Stokes, who was at the time committed to a mental hospital, and one unacknowledged illegitimate child born of the relation-

ship between Stokes and Weber. A second illegitimate child of Stokes and Weber was born posthumously.

After Stokes' death, the four legitimate children, through their maternal grandmother as guardian, filed a claim under Louisiana's Workmen's Compensation Law. The defendant employer and its insurer, Aetna Casualty and Surety Company, converted the matter into an interpleader action and impleaded, among others, the two illegitimate children of Stokes and Weber. Weber appeared and claimed compensation for the two illegitimate children.

In the meantime, an action was brought by the four legitimate children against a third-party tortfeasor. The suit was settled for an amount in excess of the maximum benefits allowable under workmen's compensation. The illegitimate children did not share in the settlement. Subsequently, the employer requested that the claim for workmen's compensation be rejected for all parties.

After trial on the merits, the trial judge rendered a judgment awarding all of the workmen's compensation benefits to the four legitimate children and declaring that their entitlement was satisfied by the tort suit settlement. Judgment was rendered in favor of Willie Mae Weber, for the use and benefit of the illegitimate children, to the extent that the maximum compensation benefits were not exhausted by the four legitimate children. Since such benefits were completely exhausted by the amount of the tort settlement, the illegitimate children received no part of the award while the legitimate children shared the entire amount.

The judgment was affirmed against constitutional objections by the Louisiana Court of Appeal and the Supreme Court of Louisiana.

The Question Presented

Whether Louisiana Revised Statutes (LRS), Title 23, Sections 1021 (3) and 1232, which deny recovery under the workmen's compensation statute to unacknowledged illegitimate dependent children for the death of their father, where such benefits are exhausted by the claims of the father's legitimate children, are invalid under the Fourteenth Amendment to the Constitution of the United States.

Argument

In this case involving discrimination against minor, dependent children because they were born out of wedlock, there are three principal issues. The first two—equal protection and due process—are discussed in Points I and II of this brief, *infra*.

The third issue, which is inextricably involved with the other two issues, is *stare decisis*. Simply stated, the question is whether the Court desires to overrule *Levy v. Louisiana*, 391 U.S. 71 (1968), which held that the Fourteenth Amendment invalidated a Louisiana wrongful death statute that denied recovery to unacknowledged illegitimate children of the deceased. In *Labine v. Vincent*, 401 U.S. 532 (1971), decided last term, the Court distinguished the *Levy* case but explicitly re-affirmed its holding. We suggest that there is no principled legal basis to distinguish the instant case from the *Levy* decision. Accordingly, the decision of the court below should be reversed on *Levy's* authority.

I.

The Louisiana law denying workmen's compensation benefits to dependent children because of their illegitimate birth violated the Equal Protection Clause as applied by the Court in *Levy v. Louisiana* and *Labine v. Vincent*.

A. *The holding of Levy*

In *Levy v. Louisiana*, 391 U.S. 71 (1968), the Court struck down as violative of the equal protection clause of the Fourteenth Amendment that part of the Louisiana wrongful death statute which denied recovery to unacknowledged illegitimate children of the deceased. The Court rejected the argument of the Louisiana Court of Appeal that the distinction between legitimate and illegitimate children served a reasonable state interest in "morals and general welfare because it discourages bringing children into the world out of wedlock." *Levy v. Louisiana*, 192 So. 2d 193, 195 (1966), cert. denied 250 La. 25, 193 So. 2d 530 (1967). This Court's opinion focused on the relationship between the legitimacy-illegitimacy distinction and the nature and purpose of the wrongful death statute.

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother We conclude that it is invidious to discriminate against them [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." 391 U.S. at 72.

In *Labine v. Vincent*, 401 U.S. 532 (1971), the Court refused to extend the rationale of *Levy* to prohibit certain

distinctions in state inheritance statutes based on legitimacy. Special emphasis was placed upon the interest of the state in regulating the disposition of private property by inheritance or otherwise, as historically recognized by the Court in previous decisions. See *Mager v. Grima*, 8 How. 490, 493 (1850); *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938) (cited in *Labine* at 401 U.S. 539, n. 16). The *Labine* opinion re-affirmed the validity of the *Levy* holding, but "decline[d] to extend the rationale . . . where it does not apply." 401 U.S. at 535.

B. *Levy* was correctly decided. Its holding is not impaired by *Labine*

In *Levy*, the Court suggested that both the "reasonable basis" and the "compelling state interest" tests for determining questions arising under the Equal Protection Clause were applicable, and that the discriminatory classification at issue was invalid under either approach.

The "reasonable basis" standard requires that any state classification bear a reasonable relationship to a legitimate state purpose.

"[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 [1896].

See also *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The judgment in *Levy* that the legitimate-illegitimate distinction bore no relationship to the purposes of the wrong-

ful death statute surely was correct. Prohibiting recovery by illegitimates in no way can be said to further the laudable state goal of compensating children who have lost a parent through the wrongful action of another. See S. Speiser, *Recovery for Wrongful Death*, ii-iv, 12-13 (1967). The opinion did not deal with the State's claim that the classification served the State's purpose in regulating morals and general welfare, apparently considering such assertion baseless. That issue was taken up in the companion case of *Glover v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), where it was dismissed as "farfetched." *Id.* at 75. Certainly this judgment was correct, for "it would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death."¹

The "compelling state interest" test, alternately applied in *Levy*,² analyzes the nature of the characteristics or traits used to determine the classification and also the scope of individual conduct regulated or proscribed by the statute. If upon such examination it is found either that the classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon a "fundamental right and liberty," the presumption of constitutionality normally accorded state enactments is reversed. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 666, 667 (1963). The statute will stand only if there "clearly appears . . . some

¹ Brief for Appellant in *Levy v. Louisiana*, p. 14.

² See 391 U.S. at 71, paragraph 2: "... we have been extremely sensitive when it comes to basic civil rights . . . The rights asserted here involve the intimate familial relationship between a child and his own mother."

overriding statutory purpose" *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), or it is "necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). See also *Oyama v. California*, 332 U.S. 633, 640 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Harper v. Board of Elections*, 383 U.S. 663, 669, 670 (1966).

To the extent that the Court's decision in *Levy* rested upon a "compelling interest" analysis, it was on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, *Brown v. Board of Education*, *supra*; ancestry or nationality, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), or alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). It is obvious that a child can no more control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities.³ See Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Co.*, 118 U. Pa. L. Rev. 1, 5-7 (1969).

³ Discriminatory treatment of the parents of illegitimate children, to the extent that it does not affect the illegitimate children themselves, might be given broader leeway, as the parents obviously have more control over giving birth to an illegitimate child than the child has over being born illegitimate. But there still must be a rational relationship between the discrimination and a legitimate state interest. See *Glona v. American Guarantee & Liability Co.*, *supra*.

C. The holding in *Levy* applies precisely to the facts of this case

In *Labine v. Vincent*, *supra*, Justice Black explained the holding in *Levy*:

"... The cause of action in *Levy* was in tort. It was undisputed that Louisiana had created a statutory tort and had provided for the survival of the deceased's cause of action, so that a large class of persons injured by the tort could recover damages in compensation for their injury. Under those circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort that took their mother's life." 401 U.S. 535-36.

The opinion further explained that in *Levy* the State "created an insurmountable barrier" to the illegitimate child, unlike the *Labine* situation. 401 U.S. at 539.

The instant case meets the standards of *Levy* as explained in *Labine* in the following ways:

1. *The state has created an injury-compensation scheme, similar to a tort remedy, in favor of a large class of potentially injured persons.*

The wrongful death statute at issue in *Levy* was typical of similar statutes enacted in the various states of this country and in England. Its traditional compensatory purpose was early set forth by the Supreme Court of Louisiana:

"[T]he object of this law was to save [children] harmless during their minority from the loss of benefits (material and moral) which they would have received

had their father lived up to the time of their respective majorities." *Eichorn v. New Orleans & C. R. Lt. & P. Co.*, 114 La. 712, 724, 38 So. 526, 530 (1904).

The workmen's compensation statute at issue here is identical in purpose and even broader in scope than the wrongful death statute involved in *Levy*. Prior to its passage, an employee suffering an occupational injury—or his family in the case of death—could obtain financial relief only through a tort action. Workmen's compensation laws sought to remove the often difficult burden of proof involved in such a lawsuit by offering an alternate, surer, but usually less remunerative recovery for work-related injuries. An employee choosing to sue under a workmen's compensation law was foreclosed from initiating a tort action against his employer. See Cheit, *Injury and Recovery in the Course of Employment*, 10 *et seq.* (1961).

In the instant case, the recovery sought under the workmen's compensation statute is in lieu of an action under the very same wrongful death statute which was at issue in *Levy*. Thus, the interests of the illegitimate children here are precisely the interests which the Court protected in *Levy*, and a classification limiting or prohibiting the recovery of illegitimates bears no more rational relationship to the purposes of a workmen's compensation statute than it does to a wrongful death statute. As Justice Barnham of the Louisiana Supreme Court recognized in dissent below:

"Compensation law is social law designed to make an employee's inability to produce income because of an employment associated injury an element of the cost of production of goods and services. . . . The State owes

every child, legitimate or illegitimate the same duty, and when the state adopts legislation to relieve itself of the support of children, a classification which prefers legitimate over illegitimate appears to be unwarranted." *Stokes v. Aetna Casualty and Surety Co.*, 257 La. 424, 242 So.2d 567, 572 (1971). (Emphasis in original.)

2. *The state has created an "insurmountable barrier" to the illegitimate children involved in this case.*

The father of the two illegitimate children in this case was also the father of four previous legitimate children, to whose mother he remained married until his death. The illegitimate children were precluded *totally* from sharing in a workmen's compensation award because the fund was exhausted by the legitimate children. Had the illegitimate children been acknowledged or legitimized, they could have shared the fund on an equal basis with the legitimate children. Both children were precluded from such status by Louisiana law because "There is no question that the illegitimate minors were not only unacknowledged but unacknowledgeable under our law." *Stokes v. Aetna Casualty and Surety Co.*, 257 La. 424, 242 So.2d 567 at 570 (Barnham, J., dissenting).⁴

⁴ LRS 23:1021 (3) defines "children" for the purposes of the workmen's compensation law to include only those "illegitimate children acknowledged under the provisions of Civil Code Article 203, 204, and 205." Article 204 provides that "Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however such acknowledgment may be made if the parents should contract a legal marriage with each other." The father of the two illegitimate children in the instant case remained married to his first wife—the mother of his four *legitimate* children—until his death. Thus, at all times he was legally barred from marrying

Thus, the two illegitimate children were barred *absolutely* from ever sharing equally with their legitimate half-brothers and sisters in the proceeds of a workmen's compensation award for the death of their mutual father. The barrier was even more "insurmountable" than in the *Levy* case, where the children could have been acknowledged and thereby permitted to recover under the wrongful death statute. Thus, the case for reversal is even stronger here than in *Levy*.

**D. *Labine v. Vincent* should be limited
to issues involving inheritance**

Labine dealt with laws by which states regulate the inheritance of private property. History might support a broader range of state discretion in this area, thereby justifying a classification based on illegitimacy as reasonably related to the goals of the inheritance statute. Thus, there arguably may be a valid state interest in providing for "the stability of . . . land titles and the prompt and definitive determination of the valid ownership of property left by descendants." *In Re Vincent*, 229 So.2d 449, 452 (La. Ct. App. 1969). The Supreme Court has long recognized a broad scope of state power here. *Mager v. Grima*, *supra*; *Lyeth v. Hoey*, *supra*. Moreover, it is taken for granted that an individual has a considerable area of choice as to whom he will bequeath his prop-

Willie Mae Weber, the mother of the two illegitimate children. It therefore was *impossible* for him to legally acknowledge his illegitimate children and thereby qualify them for protection under the Workmen's Compensation Act. See also *Williams v. American Emp. Ins. Co.*, 237 La. 101, 110 So.2d 541 (1959), in which the Louisiana Supreme Court held that a posthumously born *illegitimate* child cannot be classified as a child entitled to workmen's compensation benefits, as defined under LRS 23:1021(3).

erty. Thus, state regulations, such as that in *Labine*, that arguably seek to effectuate the probable choice of the individual in disposing of his property might be given more leeway, particularly if the individual was free during his lifetime to ignore or significantly mitigate the state classifications. It is important to note in this connection that the father in *Labine* could have legitimated his daughter or provided for her in a will, a point stressed both by the Court and by Justice Harlan in his concurring opinion.

Thus, the *Labine* case can and should be limited to state regulation of inheritance where the state classification bears a reasonable relationship to the purpose of the regulation and where the discriminatory impact of the classification can be reversed or modified by the action of the individuals involved.

II.

The discrimination imposed against the illegitimate children in this case violates the Due Process Clause of the Fourteenth Amendment because it furthers no valid state purpose and it deprives them of rights on the basis of a status over which they have no control.

We have shown in Point I that the relationship between discrimination against illegitimates and any proper state purpose is baseless, and that Louisiana has violated the Equal Protection Clause by discriminating against illegitimate children. There is in addition a violation of due process because the State has arbitrarily barred certain children from suing for compensation for their father's work-related death, and state imposition of disabilities "on a wholly arbitrary standard or on a consideration that

offends the dictates of reason offends the Due Process Clause." *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).⁵

Furthermore, the decision below is violative of the children's due process rights because it denies them rights on the basis of a condition of birth and a status over which they had no control and which they are powerless to correct. This Court has recognized in several contexts that it is impermissible to hold an individual responsible for his status or conduct over which he has no control.⁶ For example, *Robinson v. California*, 370 U.S. 660 (1962), involved a California statute making it a misdemeanor for any person to "be addicted to the use of narcotics." The Court ruled that the "status" of narcotics addiction is "an illness which may be contracted innocently or involuntarily," and that therefore any punishment for the condition is invalid as "cruel and unusual" under the Eighth and Fourteenth Amendments.

⁵ While "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), the statute here is not such a law, but is rather akin to statutes involving an aspect of personal liberty. As to such statutes, the Court has required a showing under the Due Process Clause that some proper state purpose is being pursued through reasonable means. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390; *Pierce v. Society of Sisters*, 268 U.S. 510. This requirement is consistent with the Court's statement in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), that "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . ."

⁶ A leading legal philosopher, Professor Lon Fuller, maintains that a rule which an individual has no opportunity to obey is not a law at all but an arbitrary application of governmental force. L. Fuller, *THE MORALITY OF LAW* 39, 70-73 (1964).

Professor Amsterdam, after discussing the many scholarly reviews of the *Robinson* opinion, concludes that, "Even the narrowest of these interpretations [supports] the notion that punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional." Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 *Crim. L. Bull.* 205 (1967). This precisely describes the status of the children here, who neither control nor can correct their condition of illegitimacy.

Oyama v. California, supra, brings us even closer to the instant case. There the Court struck down California's Alien Land Law that inflicted harm on a child due to the status of his father. In holding that extraordinary procedural burdens could not be imposed on a citizen in proving the ownership of land merely because his father was an alien ineligible for citizenship, the Court reiterated that distinctions based on ancestry are "by their very nature odious to a free people." 332 U. S. at 646.

The unreasonableness of imposing burdens upon children because of the actions of their parents is exemplified by an explicit constitutional policy. Article III, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." While this provision applies in terms only to cases of treason (which had largely occasioned the historic use of corruption of blood in England), it manifests a broader principle of justice—that individuals should not be denied rights because of the behavior of their ancestors which they could

not control. In fact, what Louisiana has done here is similar to the medieval form of punishment by which a "felon's blood was attainted or corrupted" with the result that he could not own property himself, "nor could any heir born before or after the felony claim through him." W. S. Holdsworth, 3 HISTORY OF ENGLISH LAW 69. Indeed, if corruption of blood is explicitly forbidden by the Constitution with respect to the heinous crime of treason, it certainly should not be permitted in lesser contexts.⁷

In sum, Louisiana not only has acted unreasonably, but it has denied rights to blameless individuals for the acts of others without factual or other adequate justification and it has flouted some of the most conspicuous decisions of this Court holding that a State cannot harm individuals on the basis of their ancestry. Such action by Louisiana is arbitrary and therefore inconsistent with the Due Process Clause of the Fourteenth Amendment.

⁷ See also 18 U. S. C. §3563 (1948), which provides generally that "no conviction or judgment shall work corruption of blood or forfeiture".

CONCLUSION-

For the reasons stated above, the judgment of the Supreme Court of Louisiana should be reversed.

- Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES

September Term, 1971

NO. 70-5112

WILLIE MAE WEBER,

Petitioner,

Vs.

AETNA CASUALTY & SURETY COMPANY, et al.,

Respondents

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA**

BRIEF FOR RESPONDENTS

**DALE, OWEN, RICHARDSON,
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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents have no quarrel with petitioner's statement of the case, statement of jurisdiction, statement of the constitutional provision involved, or statement of the question presented for review; therefore, respondents shall not include statements of such in their brief.

ARGUMENT

THE CLASSIFICATION IN LOUISIANA'S WORKMEN'S COMPENSATION LAW OF UNACKNOWLEDGED ILLEGITIMATE CHILDREN AS "OTHER DEPENDANTS" IS NOT INVIDIOUS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Respondents agree with petitioner that the crucial issue in this case is whether different treatment of legitimate and illegitimate children under Louisiana's Workmen's Compensation Law falls within the reasoning of *Levy vs. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509 (1968) or within the reasoning of *Labine vs. Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971). Respondents respectfully submit the case does and should fall within the reasoning of the *Labine* decision; that there is no invidious discrimination present and petitioner's claim should be denied.

Section 1232 (LSA-R.S. 23:1232) of the Louisiana Workmen's Compensation Law sets up the schedule of payment of workmen's compensation benefits to various classifications of dependents; as follows:

"Payment of dependents shall be computed and divided among them on the following basis:

- (1) If the widow or widower alone, thirty-two and one-half per centum of wages.
- (2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.
- (3) If the widow or widower and two or more children, sixty-five per centum of wages.
- (4) If one child alone, thirty-two and one-half per centum of wages of deceased.

(5) If two children, forty-six and one-quarter per centum of wages.

(6) If three or more children, sixty-five per centum of wages.

(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

Section 1021(3) (LSA-R.S. 23:1021(3)) of Louisiana's Workmen's Compensation Law provides the following definition for the terms "child" or "children" as used in Section 1232:

"As used in this Chapter, unless the context clearly indicates otherwise, the following terms shall be given the meaning ascribed to them in this Section:

* * *

(3) "Child" or "Children" covers only legitimate children, step-children, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205."

Thus, a legitimate child or an illegitimate acknowledged child is treated equally in the distribution of workmen's compensation benefits.

Unacknowledged illegitimate children have been consistently, under the jurisprudence of Louisiana, classed as "other dependents" under the provisions of Section 1232(8). *Thompson vs. Vestel Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1944); *Fidelity & Casualty Co. of New York vs. Ivory*, 129 So.2d 894 (La. App. 1961); and *Jenkins vs. Pemberton*, 87 So.2d 775 (La. App. 1956). Petitioner, in this case, is the mother of two illegitimate unacknowledged children who essentially is seeking to have her children moved up from the classification of "other dependents" of Section 1232(8) to that of "children" within 1232(6).

In order to determine the disposition of this matter, this case should be contrasted first with the *Levy* decision and then the *Labine* decision. Quite obviously, the first contrast which should be drawn with the *Levy* decision is the fact that *Levy* dealt specifically with a tort situation. In the case at bar, Louisiana's Workmen's Compensation Law is involved, not tort law. This distinction was also drawn in the *Labine* decision in the majority opinion. 401 U.S. —. Further, the *Levy* decision noted that there was a wrong inflicted on the mother of the illegitimate children and that the tortfeasor was going to free unless the illegitimate children were allowed to recover. In this case, there was no wrong committed in any manner by respondents and no tortfeasor is going free as respondents had an obligation to pay compensation benefits which was discharged under Louisiana's Workmen's Compensation Law.

In addition, there is no insurmountable barrier created by the State of Louisiana for an illegitimate to obtain workmen's compensation benefits as there was prior to *Levy* in Louisiana's tort law. As was discussed hereinabove, *an unacknowledged illegitimate does receive workmen's compensation benefits under Section 1232(8) which was not true under tort law*, and if acknowledged, receives workmen's compensation benefits *equally* with legitimate children as provided in

Section 1021(3). Louisiana Civil Code Article 2315 (LSA-C.C. Art. 2315) setting up persons entitled to recover in tort prior to *Levy* absolutely excluded illegitimate children from tort recovery, which is clearly to the contrary in the case of Louisiana's Workmen's Compensation Law, which was noted by the Court in the *Levy* decision in Footnote 7 to the Court's opinion. 391 U.S. 72.

On Page 9 of petitioner's brief, petitioner indicates that the judgment of the trial court in this case (R.32-33) recognized petitioner's rights under Section 1232(8) but said recognition is regarded as meaningless. The rights of an illegitimate under Section 1232(8) are not meaningless, as said section clearly provides that if there are no other dependents in the preceding classifications, then a sufficient number of illegitimate children could receive workmen's compensation benefits up to the maximum rate of sixty-five per cent of the employee's wages.

In addition, if there are an insufficient number of dependents in the preceding classifications to use up the maximum rate of benefits, then the illegitimate children under subsection 8 would get the remainder of the benefits. Also, in this particular case it is possible for two or more of the legitimate children to not live and recover the workmen's compensation benefits during the entire benefit period of 400 weeks (LSA-R.S. 23:1231) which would permit the remainder to go to the illegitimate children under subsection 8. Thus, the right afforded unacknowledged illegitimate children under subsection 8 is a real and meaningful right, although at present in this particular case, there is no recovery to petitioner.

In comparing this case with *Labine*, it should be noted that this case is much closer to *Labine* and indeed an improvement of many of *Labine*'s points of distinction. As *Labine* noted, there is no insurmountable barrier as is present in

Levy. 401 U.S. —. This point of distinction becomes even stronger in this case than in *Labine* as *without* acknowledgment, an illegitimate child has a right of recovery of workmen's compensation benefits under Section 1232(8), whereas without acknowledgment, an illegitimate child does not have a right of inheritance at all under Louisiana's succession laws. Louisiana Civil Code Article 920 (LSA-C.C. Art. 920) provides that:

"Bastard, adulterous or incestuous children shall not enjoy the right of inheriting the estates of their natural father or mother in any of the cases above mentioned, the laws allowing them nothing more than a mere alimony."

Thus, without acknowledgment, illegitimate children in Louisiana's Workmen's Compensation Law have a right of recovery where they do not have a right of inheritance. In addition, acknowledged illegitimate children have a right of inheritance as noted in *Labine*, although they are still *not treated equally with legitimate children*. This is not true in Louisiana Workmen's Compensation Law, as Section 1021(3) clearly provides that *an acknowledged illegitimate child is treated equally under Louisiana's Workmen's Compensation Law in recovering workmen's compensation benefits*. Thus, the insurmountable barrier found in *Levy* is much less possible in Louisiana's Workmen's Compensation Law than in Louisiana succession law and the *Labine* decision has already found it not to exist in Louisiana's succession law.

In addition, by the setting up of classifications and ranking of classifications under Section 1232 of Louisiana's Workmen's Compensation Law, there is "discrimination;" however, this "discrimination" is no different than that noted in *Labine* to exist in Louisiana succession law, as there is "discrimination" therein against collateral relations as opposed to ascendants and against ascendants as opposed to descendants.

401 U.S. —. The "discrimination" of Section 1232 sets up classifications which also "discriminate" against dependent parents as opposed to illegitimate acknowledged or legitimate children.

As the Court noted in its opinion in the *Labine* decision, "*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring." 401 U.S. —. In addition, the Court in *Labine* noted that "... the choices reflected by the intestate succession statutes are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court can provide better rules." 401 U.S. —. This rationale is applicable to this case, as the State of Louisiana, as reflected in the opinion of the Louisiana Supreme Court, feels that the ranking of legitimate children over unacknowledged illegitimate children protects legally recognized family relationships which protection was within the legitimate power of Louisiana. *Stokes vs. Aetna Casualty and Surety Company*, 257 La. 424, 242 So.2d 567 (1971), at page 570 (R. 75-76).

Thus, it should be clearly seen that this case is well-embraced within the rationale of the *Labine* decision as opposed to the *Levy* decision. In addition, as noted by the *Levy* decision, a State has broad power in making classifications and, "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the Legislature in making classifications." 391 U.S. 71. The Louisiana Workmen's Compensation Law is certainly social and economic legislation which, according to this Honorable Court as stated in *Levy*, Louisiana had a broad power to set up and should be given great latitude in the application of the Equal Protection Clause.

CONCLUSION

Therefore, respondents respectfully submit this case is governed by the rationale of the *Labine* decision and not the *Levy* decision, as there is no invidious discrimination in the classification of unacknowledged illegitimate children under Louisiana's Workmen's Compensation Law as "other dependents" entitled to benefits after legitimate children. Thus, petitioner's claim should be denied.

Respectfully submitted,

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WEBER v. AETNA CASUALTY & SURETY CO.
ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 70-5112. Argued February 28, 1972—Decided April 24, 1972

Decedent, who died as a result of injuries received during the course of his employment, had maintained a household with four legitimate minor children, one unacknowledged minor child, and petitioner, to whom he was not married. His wife had been committed to a mental hospital. A second illegitimate child was born posthumously. Under Louisiana's workmen's compensation law unacknowledged illegitimate children are not within the class of "children," but are relegated to the lesser status of "other dependents," and may recover only if there are not enough surviving dependents in the preceding classes to exhaust the maximum benefits. The four legitimate children were awarded the maximum allowable compensation and the two illegitimate children received nothing. The Louisiana courts sustained the statutory scheme, holding that *Levy v. Louisiana*, 391 U. S. 68, was not controlling. *Held*: Louisiana's denial of equal recovery rights to the dependent unacknowledged illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment, as the inferior classification of these dependent children bears no significant relationship to the recognized purposes of recovery that workmen's compensation statutes were designed to serve. *Levy v. Louisiana*, *supra*, followed; *Labine v. Vincent*, 401 U. S. 532, distinguished. Pp. 167-176.

257 La. 424, 242 So. 2d 567, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 176. REHNQUIST, J., filed a dissenting opinion, *post*, p. 177.

Vanue B. Lacour argued the cause and filed a brief for petitioner.

W. Henson Moore argued the cause and filed a brief for respondents.

Norman Dorsen and Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question before us, on writ of certiorari to the Supreme Court of Louisiana,¹ concerns the right of dependent unacknowledged, illegitimate children to recover under Louisiana workmen's compensation laws benefits for the death of their natural father on an equal footing with his dependent legitimate children. We hold that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment. *Levy v. Louisiana*, 391 U. S. 68 (1968). *Glonn v. American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968).

On June 22, 1967, Henry Clyde Stokes died in Louisiana of injuries received during the course of his employment the previous day. At the time of his death Stokes resided and maintained a household with one Willie Mae Weber, to whom he was not married. Living in the household were four legitimate minor children, born of the marriage between Stokes and Adlay Jones Stokes who was at the time committed to a mental hospital. Also living in the home was one unacknowledged illegitimate child born of the relationship between Stokes and Willie Mae Weber. A second illegitimate child of Stokes and Weber was born posthumously.

On June 29, 1967, Stokes' four legitimate children, through their maternal grandmother as guardian, filed a claim for their father's death under Louisiana's work-

¹ *Stokes v. Aetna Casualty & Surety Co.*, 257 La. 424, 242 So. 2d 567 (1970).

men's compensation law.² The defendant employer and its insurer, impleaded Willie Mae Weber who appeared and claimed compensation benefits for the two illegitimate children.

Meanwhile, the four legitimate children had brought another suit for their father's death against a third-party tortfeasor which was settled for an amount in excess of the maximum benefits allowable under workmen's compensation. The illegitimate children did not share in this settlement. Subsequently, the employer

² La. Rev. Stat. § 23:1232 (1967) establishes the schedule of payment of workmen's compensation benefits to various classifications of dependents as follows:

La. Rev. Stat. § 23:1232:

"Payment to dependents shall be computed and divided among them on the following basis:

"(1) If the widow or widower alone, thirty-two and one-half per centum of wages.

"(2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.

"(3) If the widow or widower and two or more children, sixty-five per centum of wages.

"(4) If one child alone, thirty-two and one-half per centum of wages of deceased.

"(5) If two children, forty-six and one-quarter per centum of wages.

"(6) If three or more children, sixty-five per centum of wages.

"(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

"(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

in the initial action requested the extinguishment of all parties' workmen's compensation claims by reason of the tort settlement.

The trial judge awarded the four legitimate children the maximum allowable amount of compensation and declared their entitlement had been satisfied from the tort suit settlement. Consequently, the four legitimate children dismissed their workmen's compensation claim. Judgment was also awarded to Stokes' two illegitimate offspring to the extent that maximum compensation benefits were not exhausted by the four legitimate children. Since such benefits had been entirely exhausted by the amount of the tort settlement, in which only the four dependent legitimate offspring participated, the two dependent illegitimate children received nothing.

I

For purposes of recovery under workmen's compensation, Louisiana law defines children to include "only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205."³ Thus, legitimate children and acknowledged ille-

³ La. Rev. Stat. §23:1021 (3). The relevant provisions for acknowledgment of an illegitimate child are as follows:

La. Civ. Code, Art. 202 (1967):

"Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards."

La. Civ. Code, Art. 203:

"The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it

gitimates may recover on an equal basis. Unacknowledged illegitimate children, however, are relegated to the lesser status of "other dependents" under § 1232 (8) of the workmen's compensation statute⁴ and may recover *only* if there are not enough surviving dependents in the preceding classifications to exhaust the maximum allowable benefits. Both the Louisiana Court of Appeal⁵ and a divided Louisiana Supreme Court⁶ sustained these statutes over petitioner's constitutional objections, holding that our decision in *Levy, supra*, was not controlling.

We disagree. In *Levy*, the Court held invalid as denying equal protection of the laws, a Louisiana statute which barred an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized. The Court there decided that the fact of a child's birth out of wedlock bore no reasonable relation to the purpose of wrongful-death statutes which compensate children for the death of a mother. As the Court said in *Levy*:

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."
Levy v. Louisiana, 391 U. S., at 72.

shall not have been made in the registering of the birth or baptism of such child."

La. Civ. Code, Art. 204:

"Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however, such acknowledgment may be made if the parents should contract a legal marriage with each other."

⁴ See n. 2, *supra*.

⁵ 232 So. 2d 328 (La. App. 1969).

⁶ *Stokes v. Aetna Casualty & Surety Co.*, see n. 1, *supra*.

The court below sought to distinguish *Levy* as involving a statute which absolutely excluded *all* illegitimates from recovery, whereas in the compensation statute in the instant case acknowledged illegitimates may recover equally with legitimate children and "the unacknowledged illegitimate child is not *denied* a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents . . .". *Stokes v. Aetna Casualty & Surety Co.*, 257 La. 424, 438 So. 2d 567, 570 (1970). The Louisiana Supreme Court likewise characterized *Levy* as a tort action where the tortfeasor escaped liability on the fortuity of the potential claimant's illegitimacy, whereas in the present action full compensation was rendered, and "no tortfeasor goes free because of the law." *Id.*, at 434, 424 So. 2d, at 570.

We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover.⁷ The legitimate children and the illegitimate child all lived in the home of the deceased and were

⁷ The affinity and dependency on the father of the posthumously born illegitimate child is, of course, not comparable to that of offspring living at the time of their father's death. This fact, however, does not alter our view of the case. We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child, which the Louisiana statutes fail to do.

equally dependent upon him for maintenance and support. It is inappropriate, therefore, for the court below to talk of relegating the unacknowledged illegitimate "to a less favorable position as are other dependent relatives such as parents." The unacknowledged illegitimate is *not* a parent or some "other dependent relative"; in this case she is a *dependent child*, and as such is entitled to rights granted other *dependent children*.

Respondents contend that our recent ruling in *Labine v. Vincent*, 401 U. S. 532 (1971), controls this case. In *Labine*, the Court upheld, against constitutional objections, Louisiana intestacy laws which had barred an acknowledged illegitimate child from sharing equally with legitimate children in her father's estate. That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *Id.*, at 538. The Court has long afforded broad scope to state discretion in this area.⁸ Yet the substantial state interest in providing for "the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents," *Labine v. Vincent*, 229 So. 2d 449, 452 (La. App. 1969), is absent in the case at hand.

Moreover, in *Labine* the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position. As the Court there remarked:

"Ezra Vincent could have left one-third of his property to his illegitimate daughter had he bothered

⁸ The Court over a century ago voiced strong support for state powers over inheritance: "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager v. Grima*, 8 How. 490, 493 (1850). See *Lyeth v. Hoey*, 305 U. S. 188, 193 (1938).

to follow the simple formalities of executing a will. He could, of course, have legitimated the child by marrying her mother in which case the child could have inherited his property either by intestate succession or by will as any other legitimate child."

Labine, supra, at 539.

Such options, however, were not realistically open to Henry Stokes. Under Louisiana law he could not have acknowledged his illegitimate children even had he desired to do so.⁹ The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them.

Both the statute in *Levy* and the statute in the present case involve state-created compensation schemes, designed to provide close relatives and dependents of a deceased a means of recovery for his often abrupt and accidental death. Both wrongful-death statutes and workmen's compensation codes represent outgrowths and modifications of our basic tort law. The former alleviated the harsh common-law rule under which "no person could inherit the personal right of another to recover for

⁹ La. Civ. Code, Art. 204, see n. 3, *supra*, prohibits acknowledgment of children whose parents were incapable of contracting marriage at the time of conception. Acknowledgment may only be made if the parents could contract a legal marriage with each other. Decedent in the instant case remained married to his first wife—the mother of his four legitimate children—until his death. Thus, at all times he was legally barred from marrying Willie Mae Weber, the mother of the two illegitimate children. It therefore was impossible for him to acknowledge legally his illegitimate children and thereby qualify them for protection under the Louisiana Workmen's Compensation Act. See also *Williams v. American Emp. Ins. Co.*, 237 La. 101, 110 So. 2d 541 (1959), where the Louisiana Supreme Court held that a posthumously born illegitimate child cannot be classified as a child entitled to workmen's compensation benefits, as defined under La. Rev. Stat. § 23:1021 (3).

tortious injuries to his body";¹⁰ the latter removed difficult obstacles to recovery in work-related injuries by offering a more certain, though generally less remunerative compensation. In the instant case, the recovery sought under the workmen's compensation statute was in lieu of an action under the identical death statute which was at issue in *Levy*.¹¹ Given the similarities in the origins and purposes of these two statutes, and the similarity of Louisiana's pattern of discrimination in recovery rights, it would require a disregard of precedent and the principles of *stare decisis* to hold that *Levy* did not control the facts of the case before us. It makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy*; the discrimination remains apparent.

II

Having determined that *Levy* is the applicable precedent, we briefly reaffirm here the reasoning which produced that result. The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey v. Doud*, 354 U. S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955); *Gulf, Colorado & Santa Fé R. Co. v. Ellis*, 165 U. S. 150 (1897); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny; *Brown v. Board of Education*, 347 U. S. 483 (1954); *Harper v. Virginia Board of Elections*, 383 U. S.

¹⁰ See 391 U. S. 73, 76 (1968) (Harlan, J., dissenting in *Glover v. American Guarantee & Liability Insurance Co.*, and *Levy v. Louisiana*).

¹¹ La. Civ. Code, Art. 2315.

663 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

The Louisiana Supreme Court emphasized strongly the State's interest in protecting "legitimate family relationships," 257 La., at 433, 242 So. 2d, at 570, and the regulation and protection of the family unit has indeed been a venerable state concern. We do not question the importance of that interest; what we do question is how the challenged statute will promote it. As was said in *Glon*:

"[W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glon v. American Guarantee & Liability Insurance Co.*, *supra*, at 75.

Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation.

It may perhaps be said that statutory distinctions between the legitimate and illegitimate reflect closer family relationships in that the illegitimate is more often not under care in the home of the father nor even supported by him. The illegitimate, so this argument runs, may thus be made less eligible for the statutory recoveries and inheritances reserved for those more likely to be within the ambit of familial care and affection. Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery,

and where the acknowledgment so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate even where the illegitimate child may be nourished and loved.

Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful-death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood.¹² Our decision fully

¹² The most relevant sections of the Louisiana statutes defining dependency for purposes of workmen's compensation recovery read as follows:

La. Rev. Stat. § 23:1231:

"For injury causing death within two years after the accident there shall be paid to the legal dependent of the employee, actually and wholly dependent upon his earnings for support at the time of the accident and death, a weekly sum as hereinafter provided, for a period of four hundred weeks. . . ."

La. Rev. Stat. § 23:1251:

"The following persons shall be conclusively presumed to be wholly and actually dependent upon the deceased employee:

"(3) A child under the age of eighteen years . . . upon the parent with whom he is living at the time of the injury of the parent."

The above section thus qualifies the illegitimate children in this case as dependents.

La. Rev. Stat. § 23:1252:

"In all other cases, the question of legal and actual dependency in whole or in part, shall be determined in accordance with the facts as they may be at the time of the accident and death. . . ."

Naturally, the variations of dependency claims coming to Louisiana courts under these sections are many, but Louisiana has consistently required valid evidence of dependency for recovery. See, e. g., *Sandidge v. Aetna Casualty & Surety Co.*, 29 So. 2d 522 (La.

respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and avoids altogether diffuse questions of affection and affinity which pose difficult probative problems. Our ruling requires equality of treatment between two classes of persons the genuineness of whose claims the State might in any event be required to determine.

The state interest in legitimate family relationships is not served by the statute; the state interest in minimizing problems of proof is not significantly disturbed by our decision. The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.¹³ Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent

App. 1947), where children, living with their mother who was separated from the father, in order to receive the maximum compensation for the father's death, must establish that they were wholly dependent upon the father for their support.

¹³ See, e. g., Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1 (1969). A comprehensive study of the legal status of illegitimacy and the effects thereof is H. Krause, *Illegitimacy: Law and Social Policy* (1971); reviewed by Wadlington, 58 Va. L. Rev. 188 (1972).

BLACKMUN, J., concurring in result. 406 U.S.

the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth¹⁴ where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring in the result.

For me, La. Civ. Code, Art. 204, is the provision in the State's statutory structure that proves fatal for this workmen's compensation case under the focus of constitutional measurement. The Article operated to deny Henry Stokes the ability even to acknowledge his illegitimates so that they might qualify as children within the definition provided by La. Rev. Stat. § 23:1021 (3). This is so because the decedent (inasmuch as he was then married to Adlay Jones Stokes and remained married to her the rest of his life) and the mother were incapable of contracting marriage at the time of conception and thereafter. This bar, indeed, under the Court's decided cases, denied equal protection to the illegitimates. Cf. *Labine v. Vincent*, 401 U. S. 532, 539 (1971).

I thus give primary emphasis to the presence of Art. 204 and, I believe, far more emphasis than does the Court. If that statute did not exist or were inapplicable, the case might be a different one. While the Court refers to Art. 204, and to a degree relies upon it, *ante*, at 171 n. 9, it seems to me that it does so only secondarily. I read the opinion as flatly granting dependent unacknowledged illegitimate children full equality with dependent legitimate children and therefore as striking down the Lou-

¹⁴ See *Graham v. Richardson*, 403 U. S. 365 (1971); *Hunter v. Erickson*, 393 U. S. 385 (1969); *Brown v. Board of Education*, 347 U. S. 483 (1954); and see also *Hirabayashi v. United States*, 320 U. S. 81 (1943).

isiana statutory scheme even for the situation where the father has the power to acknowledge his illegitimates but refrains from doing so. In other words, the Court holds the Louisiana system unconstitutional with respect to illegitimate dependent children wholly apart from the barrier of Art. 204. Certainly, the first paragraph of the opinion is to this effect.

In deciding this case, I need not, and would not, go that far. I would let the resolution of that issue await its appropriate presentation.

MR. JUSTICE REHNQUIST, dissenting.

This case is distinguishable from *Levy v. Louisiana*, 391 U. S. 68 (1968), and could be decided the other way on the basis of this Court's more recent decision in *Labine v. Vincent*, 401 U. S. 532 (1971). Yet I certainly do not regard the Court's decision as an unreasonable drawing of the line between *Levy* and *Labine*, and would not feel impelled to dissent if I regarded *Levy* as rightly decided. I do not so regard it. I must agree with Mr. Justice Harlan's dissenting opinion, which described *Levy* and its companion case, *Giona v. American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968), as "constitutional curiosities," and called the Court's method of reaching the result "a process that can only be described as brute force." 391 U. S., at 76.

Since *Levy* was a constitutional holding, its doctrine is open to later re-examination to a greater extent than if it had decided a question of statutory construction or some other nonconstitutional issue. See *Coleman v. Alabama*, 399 U. S. 1, 22 (1970) (BURGER, C. J., dissenting); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U. S. 235, 259 (1970) (Black, J., dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405-410 (1932) (Brandeis, J., dissenting).

The Equal Protection Clause was adopted as a part of the Fourteenth Amendment in 1868. Five years later Mr. Justice Miller delivered this Court's initial construction of that amendment in his classic opinion in *Slaughter-House Cases*, 16 Wall. 36 (1873). After setting forth an account of the adoption of that amendment, he described the account as a "recapitulation of events, almost too recent to be called history, but which are familiar to us all." 16 Wall., at 71. Referring to the Equal Protection Clause, he said:

"We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." 16 Wall., at 81.

In nearly 100 years of subsequent adjudication concerning this clause, the Court has adhered to the notion expressed in the *Slaughter-House Cases* that racial classifications are "suspect." See, e. g., *Loving v. Virginia*, 388 U. S. 1 (1967). But during that same period of time, this Court has proved Mr. Justice Miller a bad prophet with respect to nonracial classification.

As noted in *Levy*, in the field of economic and social legislation, the Court has given great latitude to the legislatures in making classifications. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Morey v. Doud*, 354 U. S. 457 (1957). The test has been whether there is any rational basis for the legislative classification. See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947). "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U. S. 420, 425-426

(1961). Under this test, so long as the "discrimination is founded upon a reasonable distinction, or difference in state policy," *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 528 (1959), the Court will not attempt to weigh its social value or determine whether the classification might have been more finely drawn. *Ferguson v. Skrupa*, 372 U. S. 726 (1963). However, this salutary principle has been departed from by the Court in recent years, as pointed out in its opinion here, where the Court has felt that the classification has affected what it conceives to be "fundamental personal rights."

The difficulty with this approach, devoid as it is of any historical or textual support in the language of the Equal Protection Clause, is that it leaves apparently to the Justices of this Court the determination of what are, and what are not, "fundamental personal rights." Those who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action through legislation or otherwise. While the determination of the extent to which a right is protected may result in the drawing of fine lines, the fundamental sanction to the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of the doctrine of "fundamental personal rights." This body of doctrine created by the Court can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.

The Court's experience with similar superstructures has not been a happy one. The first part of this century saw the evolution of the doctrine of "freedom of contract" which was held by the Court during part of that time to be a part of the Fourteenth Amendment's requirement that no person be deprived of life, liberty, or property without due process of law. This doctrine

had its just deserts in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391 (1937), where Mr. Chief Justice Hughes, speaking for the Court, said:

"The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

In a similar vein it may be said that the Constitution does not speak of "fundamental personal rights," but speaks of the equal protection of the laws and prohibits the denial thereof. Two years ago, this Court in *Dandridge v. Williams*, 397 U. S. 471 (1970), recognized that the broad latitude accorded state legislatures by both the contemporary history and the text of the Equal Protection Clause was not limited to statutes regulating business or industry. There, in a case dealing with the administration of public welfare assistance which, the Court noted, "involves the most basic economic needs of impoverished human beings," the Court nonetheless quite properly applied the "rational basis" constitutional standard. 397 U. S., at 485. It reaffirmed the historically correct statement of the meaning of equal protection in these words:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69–70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U. S. 420, 426."

The Court in today's opinion, recognizing that two different standards have been applied in equal protection cases, apparently formulates a hybrid standard which is the basis of decision here. The standard is a two-pronged one:

"What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

Surely there could be no better nor more succinct guide to sound legislation than that suggested by these two questions. They are somewhat less useful, however, as guides to constitutional adjudication. How is this Court to determine whether or not a state interest is "legitimate"? And how is the Court to know when it is dealing with a "fundamental personal right"?

While the Court's opinion today is by no means a sharp departure from the precedents on which it relies, it is an extraordinary departure from what I conceive to be the intent of the framers of the Fourteenth Amendment and the import of the traditional presumption of constitutionality accorded to legislative enactments. Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a "legitimate" state interest, or what is a "fundamental personal right." The traditional police power of the

States has been deemed to embrace any measure thought to further the well-being of the State in question, subject only to the specific prohibitions contained in the Federal Constitution. That Constitution of course contains numerous guarantees of individual liberty, which I would have no trouble describing as "fundamental personal liberties," but the right of illegitimate children to sue in state court to recover workmen's compensation benefits is not among them.

The relationship of the "legitimate" state interest and "fundamental personal right" analysis to the constitutional guarantee of equal protection of the law is approximately the same as that of "freedom of contract" to the constitutional guarantee that no person shall be deprived of life, liberty, or property without due process of law. It is an invitation for judicial exegesis over and above the commands of the Constitution, in which values that cannot possibly have their source in that instrument are invoked to either validate or condemn the countless laws enacted by the various States. In refusing to accept the breadth of meaning of the Fourteenth Amendment urged upon the Court in the *Slaughter-House Cases*, Mr. Justice Miller said:

"And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." 16 Wall., at 78.

Mr. Justice Harlan made clear in his dissent in *Levy* the exclusively statutory basis for wrongful-death actions as a matter of legal history, and the same may be even more emphatically said about claims for workmen's

compensation benefits. In spite of the Court's statement of a test, one part of which requires the determination of the extent to which "fundamental personal rights" might be endangered by the Louisiana classification here, we are nowhere told in the opinion just what "fundamental personal right" it is that is involved, to say nothing of whether it is "endangered." The Court says that, while society has long condemned "irresponsible liaisons beyond the bonds of marriage," nonetheless "visiting this condemnation on the head of an infant is illogical and unjust." A fair-minded man might regard it as both, but the Equal Protection Clause of the Fourteenth Amendment requires neither that state enactments be "logical" nor does it require that they be "just" in the common meaning of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved.

In the instant case I cannot condemn as irrational Louisiana's distinction between legitimate and illegitimate children. In a statutory compensation scheme such as this, the State must inevitably draw rather fine and arbitrary lines. For example, Louisiana declares that parents will have priority in this scheme over first cousins, regardless of the degree of dependency or affection in any given case. Surely, no one would condemn this classification as violative of the Fourteenth Amendment, since it is likely to reflect fairly the unarticulated intent of the decedent. Similarly, the State might rationally presume that the decedent would have preferred the compensation to go to his legitimate children, rather than those illegitimates whom he has not acknowledged.

Although the majority argues that "the state interest in minimizing problems of proof is not *significantly* disturbed by our decision," *ante*, at 175 (emphasis added), it clearly recognizes, as it must, that under its decision

additional and sometimes more difficult problems of proof of paternity and dependency may be raised. This is particularly true with respect to petitioner's youngest child, who was not born until after the death of his father. I believe that a State's desire to lessen these problems under its statutory scheme is a rational basis for difference in treatment of the two classes.

Finally, the majority apparently draws some comfort from the fact that the illegitimate children here could not have been acknowledged, since the decedent remained married to another woman while he raised these children. However, I do not believe that it follows from this fact that the statutory classification is irrational. On the contrary, this element of the statutory scheme points up another possible legislative purpose which I do not believe this Court should so freely dismiss. Louisiana, like many other States, has a wide variety of laws designed to encourage legally recognized and responsible family relationships. I believe this particular statutory provision, forbidding acknowledgment of illegitimate children when the parents were not free to marry (in this case because the father was already married to another woman), might be considered part of that statutory pattern designed to discourage formation of illicit family relationships. Whether this is a wise state policy, and whether this particular statute will be particularly effective in advancing it, are not matters for this Court's determination.

Levy and today's decision are not only inconsistent with the long line of earlier cases construing the Equal Protection Clause to forbid only irrational classifications; they are quite inconsistent with *Dandridge v. Williams*, *supra*, decided two years after *Levy*. If state welfare legislation involving "the most basic economic needs of impoverished human beings" is to be judged by the traditional "reasonable basis" standard, I am at a

loss to see why that standard should not likewise govern legislation determining eligibility for state workmen's compensation benefits.

All legislation involves classification and line drawing of one kind or another. When this Court expands the traditional "reasonable basis" standard for judgment under the Equal Protection Clause into a search for "legitimate" state interests that the legislation may "promote," and "for fundamental personal rights" that it might "endanger," it is doing nothing less than passing policy judgments upon the acts of every state legislature in the country.